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07 UNITED STATES DISTRICT COURT  
08 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

09 MICHAEL R. BERRY, ) Case No. C07-1319-TSZ-JPD  
10 Plaintiff, )  
11 v. )  
12 MICHAEL J. ASTRUE, Commissioner, ) REPORT AND RECOMMENDATION  
13 Social Security Administration, )  
14 Defendant. )

15 Plaintiff Michael J. Berry appeals the final decision of the Commissioner of the Social  
16 Security Administration (“Commissioner”) which denied his applications for Disability  
17 Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and  
18 XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an  
19 administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends  
20 that the Commissioner’s decision be AFFIRMED and this case be DISMISSED with  
21 prejudice.

22 I. FACTS AND PROCEDURAL HISTORY

23 Plaintiff is a forty-eight year old man, with a high school education and post-high  
24 school apprenticeship training in pipe fitting and plumbing. Administrative Record (“AR”) at  
25 65, 151. His past work experience includes employment as a mechanic, pipe fitter, mail  
26 handler and teacher’s aid. AR at 91. Plaintiff was last gainfully employed in June 2004. AR

01 at 91.

02 On May 21, 2004, plaintiff filed a claim for SSI and DIB, alleging an onset date of  
03 November 1, 2000. AR at 23. He subsequently amended his onset date to October 29, 2004.  
04 AR at 23. Plaintiff asserts that he is disabled due to pancreatitis and diabetes type II. AR at  
05 25.

06 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 23.  
07 Plaintiff requested a hearing which took place on September 7, 2006. AR at 379-95. On  
08 November 22, 2006, the ALJ issued a decision finding plaintiff not disabled and denying  
09 benefits based on his finding that plaintiff could perform a specific job existing in significant  
10 numbers in the national economy. AR at 23-34. Plaintiff submitted additional material to the  
11 Appeals Council as part of an administrative appeal of the ALJ's decision. This additional  
12 material consisted of a letter from the plaintiff's attorney and a declaration from Shiraz  
13 Ahmed, M.D., the plaintiff's treating physician. AR at 9, 369-75. Plaintiff's administrative  
14 appeal was denied by the Appeals Council, which adopted the ALJ's ruling. AR at 5-9.  
15 Accordingly, these rulings became the "final decision" of the Commissioner as that term is  
16 defined by 42 U.S.C. § 405(g). Plaintiff timely filed the present action challenging the  
17 Commissioner's decision. Dkt. No. 1.

## 18 II. JURISDICTION

19 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
20 405(g) and 1383(c)(3).

## 21 III. STANDARD OF REVIEW

22 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
23 social security benefits when the ALJ's findings are based on legal error or not supported by  
24 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
25 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
26 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

01 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
 02 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in  
 03 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
 04 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
 05 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
 06 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence  
 07 is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
 08 must be upheld. *Id.*

09 The Court may direct an award of benefits where "the record has been fully developed  
 10 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
 11 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273,  
 12 1292 (9th Cir. 1996)). The Court may find that this occurs when:

13 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
 14 claimant's evidence; (2) there are no outstanding issues that must be resolved  
 15 before a determination of disability can be made; and (3) it is clear from the  
 record that the ALJ would be required to find the claimant disabled if he  
 considered the claimant's evidence.

16 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
 17 erroneously rejected evidence may be credited when all three elements are met).

#### 18 IV. EVALUATING DISABILITY

19 As the claimant, Mr. Berry bears the burden of proving that he is disabled within the  
 20 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
 21 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
 22 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
 23 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
 24 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments  
 25 are of such severity that he is unable to do his previous work, and cannot, considering his age,  
 26 education, and work experience, engage in any other substantial gainful activity existing in the

01 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180  
02 F.3d 1094, 1098-99 (9th Cir. 1999).

03         The Commissioner has established a five step sequential evaluation process for  
04 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
05 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
06 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
07 any step in the sequence, the inquiry ends without the need to consider subsequent steps.  
08 Step one asks whether the claimant is presently engaged in “substantial gainful activity.” 20  
09 C.F.R. §§ 404.1520(b), 416.920(b).<sup>1</sup> If he is, disability benefits are denied. If he is not, the  
10 Commissioner proceeds to step two. At step two, the claimant must establish that he has one  
11 or more medically severe impairments, or combination of impairments, that limit his physical  
12 or mental ability to do basic work activities. If the claimant does not have such impairments,  
13 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
14 impairment, the Commissioner moves to step three to determine whether the impairment  
15 meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§  
16 404.1520(d), 416.920(d). A claimant whose impairment meets or equals one of the listings for  
17 the required twelve-month duration requirement is disabled. *Id.*

18         When the claimant’s impairment neither meets nor equals one of the impairments listed  
19 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
20 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
21 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work  
22 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
23 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,  
24 then the burden shifts to the Commissioner at step five to show that the claimant can perform

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26         <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

01 other work that exists in significant numbers in the national economy, taking into  
02 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§  
03 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the  
04 claimant is unable to perform other work, then the claimant is found disabled and benefits may  
05 be awarded.

#### 06 V. DECISION BELOW

07 On November 22, 2006, the ALJ issued a decision finding:

- 08 1. The claimant meets the insured status requirements of the Social  
09 Security Act through December 31, 2009.
- 10 2. The claimant has not engaged in substantial gainful activity since  
11 October 29, 2004, the amended alleged onset date (20 CFR  
12 404.1520(b) and 404.1571 *et seq.*).
- 13 3. The claimant has the following severe impairments: alcoholic  
14 pancreatitis and diabetes type II (20 CFR 404.1520(c)).
- 15 4. The claimant does not have an impairment or combination of  
16 impairments that meets or medically equals one of the listed  
17 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR  
18 404.1520(d), 404.1525 and 404.1526).
- 19 5. After careful consideration of the entire record, I find that the claimant  
20 has the residual functional capacity to occasionally lift and carry 20  
21 pounds, frequently lift and carry ten pounds, stand and/or walk for six  
22 hours in an eight hour day, sit for six hours in an eight hour day, and do  
23 unlimited pushing and pulling.
- 24 6. The claimant is unable to perform any past relevant work (20 CFR  
25 404.1565).
- 26 7. The claimant was born on November 4, 1959 and was 44 years old on  
the alleged disability onset date, which is defined as a younger  
individual age 18-44. He is not 47, which is defined as a younger  
individual age 45-49 (20 CFR 404.1563).
8. The claimant has at least a high school education and is able to  
communicate in English (20 CFR 404.1564).
9. Transferability of job skills is not material to the determination of  
disability because applying the Medical-Vocational Rules directly  
supports a finding of "not disabled" (See SSR 82-41 and 20 CFR Part  
404, Subpart P, Appendix 2).

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1560(c) and 404.1566).

11. The claimant has not been under a "disability," as defined in the Social Security Act, from October 29, 2004 through the date of this decision (20 CFR 404.1520(g)).

AR at 25-34.

## VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Does the submission of the new evidence to the Appeals Council require remand to the ALJ?
2. Did the ALJ properly evaluate lab findings regarding the plaintiff's diabetes?
3. Did the ALJ err in his evaluation of the plaintiff's failure to comply with treatment?
4. Did the ALJ err in his evaluation of the medical opinion of Dr. Ahmed?

Dkt. No. 12 at 1.

## VII. DISCUSSION

### A. The Submission of the Ahmed Declaration Does Not Require Remand

After the decision by the ALJ, the plaintiff submitted a declaration from Dr. Ahmed to the Appeals Council. AR at 372-75. In this declaration, Dr. Ahmed opined, *inter alia*, that (1) the plaintiff's diabetes is severe and poorly-controlled; (2) the plaintiff has been non-compliant at times, but when he was compliant, this helped; (3) his non-compliance, in the judgment of the doctor, was not intentional, and being fully-compliant is demanding and the plaintiff lacks the physical and mental stamina to do so; (4) even if fully-compliant, plaintiff would suffer from fatigue; and (5) even if fully-compliant, plaintiff would be unable to perform full-time gainful employment. *Id.*

The first issue before the Court is whether the declaration filed after the ALJ's decision should be considered. The Ninth Circuit has long held that after the ALJ has

01 rendered an opinion, treating physician opinions that are solicited by claimant's counsel for  
02 litigation purposes may be rejected as less persuasive. *See, e.g., Saelee v. Chater*, 94 F.3d  
03 520, 522-23 (9th Cir. 1996); *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996); *cf. Johnson*  
04 *v. Callahan*, 975 F. Supp. 1366, 1371 (D. Or. 1997) ("Medical reports issued after the  
05 Commissioner's decision . . . are deemed less persuasive than those issued prior to the  
06 decision."). The Court recognizes the risk attendant to this situation. Were such evidence  
07 sufficient to automatically warrant a reversal, no social security appeal would proceed without  
08 claimant's counsel first obtaining it.

09       Based on the argument presented, it appears that plaintiff does not understand that the  
10 Appeals Council considered the evidence. Because the Appeals Council reviewed and  
11 weighed the evidence, it is part of the record on review to this Court. *See Gomez v. Chater*,  
12 74 F.3d 967, 971 (9th Cir. 1996); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993).

13       The Appeals Council made the declaration part of the record, but concluded:

14       In looking at your case, we considered the reasons you disagree with the  
15 decision and the additional evidence listed on the enclosed Order of Appeals  
16 Council. We found that this information does not change the basis for  
17 changing the Administrative Law Judge's decision. The decision assigned  
18 weight to Dr. Ahmed's opinion consistent with the objective evidence of  
19 record. The Administrative Law Judge provided reasons for the conclusions  
20 reached. The Administrative Law Judge found diabetes is a severe impairment  
21 and to that extent, he reviewed all treating records regarding diabetes and  
various diabetic residuals, including neuropathy. These were evaluated and  
considered when formulating your residual functional capacity. The new  
evidence submitted does not mention a different diagnosis or a treatment that  
is inconsistent with the evidence discussed by the Administrative Law Judge.  
In determining the residual functional capacity, the Administrative Law Judge  
considered these diagnoses in light of the evidence on activities of daily living.  
The finding is supported by substantial evidence.

22 AR at 5-6.

23       Plaintiff argues that the submission of Dr. Ahmed's declaration and its consideration  
24 by the Appeals Council requires that this matter be remanded to the ALJ for further  
25 consideration. However, as indicated above, the Appeals Council specifically considered the  
26 declaration and adopted the decision of the ALJ. Indeed, the plaintiff does not even address

01 the Appeals Council's analysis of the declaration. To argue a remand is necessary simply  
02 because counsel was able to obtain an after-the-fact declaration from a doctor has the  
03 possibility of turning a disability hearing into a never-ending-process. Instead, the inquiry  
04 must be on the issue addressed by the Appeals Council, namely, does the newly submitted  
05 information undermine the basis of the ALJ's decision?

06 B. The ALJ Properly Evaluated the Lab Evidence

07 Plaintiff next claims that the ALJ failed to evaluate the lab evidence properly. In his  
08 opinion, the ALJ gave great weight to some lab tests that indicated the plaintiff had normal  
09 renal and liver functioning, as well as normal cholesterol levels. AR at 30. The plaintiff then  
10 cites additional lab evidence that showed that the plaintiff suffered serious and uncontrolled  
11 diabetes. Dkt. No. 12 at 7. From there, the plaintiff extrapolates that the ALJ's medical  
12 evaluation is not supported by the record.

13 However, the ALJ never disagreed that the plaintiff suffered from uncontrolled  
14 diabetes or, as noted above, that the diabetes was a severe impairment. In its opposition, the  
15 Commissioner also argues that the tests showing normal liver function, renal functioning, and  
16 cholesterol testing were ordered by plaintiff's treating physician, and that Dr. Ahmed found  
17 that these tests were, in fact, an important indicator of plaintiff's overall health. Dkt. No. 13 at  
18 5 (citing AR at 27).

19 The ALJ did not err in his use or assessment of the lab results. Plaintiff's argument is,  
20 in actuality, one directed to the fourth assignment of error, the issue of whether the ALJ  
21 properly evaluated the medical opinions of Dr. Ahmed.

22 C. The ALJ Did Not Err by Using Plaintiff's Non-Compliance as Part of an  
23 Adverse Credibility Assessment

24 Credibility determinations are particularly within the province of the ALJ. *Andrews*,  
25 53 F.3d at 1043. Nevertheless, when an ALJ discredits a claimant's subjective symptom  
26 testimony, he must articulate specific and adequate reasons for doing so. *Greger v. Barnhart*,



01 464 F.3d 968, 972 (9th Cir. 2006). The determination of whether to accept a claimant's  
02 subjective symptom testimony requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929;  
03 *Smolen*, 80 F.3d at 1281; Social Security Ruling ("SSR") 96-7p, 1996 WL 374186, \*2-3.  
04 First, the ALJ must determine whether there is a medically determinable impairment that  
05 reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. §§ 404.1529(b),  
06 416.929(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p, 1996 WL 374186, \*2-3. Once a  
07 claimant produces medical evidence of an underlying impairment, the ALJ may not discredit  
08 the claimant's testimony as to the severity of symptoms solely because they are unsupported  
09 by objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en  
10 banc). Absent affirmative evidence that the claimant is malingering, the ALJ must provide  
11 "clear and convincing" reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at  
12 1284; *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1988).

13 An ALJ is not "required to believe every allegation of disabling pain" or other non-  
14 exertional impairment. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). When evaluating a  
15 claimant's credibility, however, the ALJ "must specifically identify what testimony is not  
16 credible and what evidence undermines the claimant's complaints." *Greger*, 464 F.3d at 972  
17 (internal quotation omitted). General findings are insufficient. *Smolen*, 80 F.3d at 1284;  
18 *Reddick*, 157 F.3d at 722. The ALJ may consider "ordinary techniques of credibility  
19 evaluation," including the claimant's reputation for truthfulness, inconsistencies in testimony  
20 or between his testimony and conduct, daily activities, work record, and the testimony from  
21 physicians and third parties concerning the nature, severity, and effect of the symptoms of  
22 which he complains. *Smolen*, 80 F.3d at 1284.

23 Here, there are no allegations that plaintiff was malingering, therefore the ALJ was  
24 required to provide clear and convincing reasons for discounting his testimony. *Reddick*, 157  
25 F.3d at 722. The ALJ found that plaintiff's medically determinable impairments could  
26 reasonably be expected to produce some of the symptoms he alleged, but concluded that

01 plaintiff's "statements concerning the intensity, persistence and limiting effects of all [the]  
02 symptoms alleged are not credible." AR at 26. In making this determination, the ALJ  
03 considered all symptoms alleged by plaintiff that could "reasonably be accepted" as consistent  
04 with the objective medical evidence and other evidence presented in the record, based on the  
05 requirements of 20 C.F.R. § 404.1529 and Social Security Rulings ("SSRs") 96-4p and 96-  
06 7p.<sup>2</sup> AR at 26.

07 The ALJ found that the plaintiff's claims of his limitations were not credible,  
08 due to his lack of compliance with medical advice, his repeated reports on no  
09 mood problems and cessation of depression medication. . . , his report that he  
10 ceased his airplane cleaning job due to lack of work, not due to his medical  
11 condition, and was laid off at Boeing and Todd shipyard . . . his allegation that  
he spent his time with his feet elevated almost all day is either gross  
exaggeration or a matter not attributable to his medical condition, and he  
managed to travel in August 2004

12 AR at 32 (citations omitted).

13 Here, the plaintiff does not assign error to an adverse credibility determination by  
14 itself, but asserts that the ALJ failed to assess properly the plaintiff's lack of compliance. A  
15 claimant's lack of motivation and follow-through with recommended treatment are proper  
16 subjects of inquiry when considering the credibility of symptom testimony. *Osenbrock v.*  
17 *Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001). The record is replete with references to the  
18 failure of the plaintiff to comply with suggested treatment that could assist the plaintiff in  
19 dealing with his diabetes. Many of these references came directly from his latest treating  
20 physician, Dr. Ahmed. *See, e.g.*, AR at 27-31. Evidence of the failure to comply was also  
21 provided by his earlier treating physician, Mark Ensminger, M.D. AR at 27.

22 Plaintiff argues that the ALJ used evidence of non-compliance incorrectly, suggesting  
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24 <sup>2</sup> Social Security Rulings do not have the force of law. Nevertheless, they "constitute  
25 Social Security Administration (SSA) interpretations of the statute it administers and of its  
26 own regulations," and are binding on all SSA adjudicators. 20 C.F.R. § 402.35(b); *Holohan*  
*v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th Cir. 2001). Accordingly, such rulings are given  
deference by the courts "unless they are plainly erroneous or inconsistent with the Act or  
regulations." *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

01 there are two ways to treat the non-compliance issue. Dkt. No. 12 at 10-12. The first is  
02 consider non-compliance in connection with an assessment of the plaintiff's credibility of his  
03 stated limitations; the second is to consider non-compliance in connection with whether the  
04 limitations should be ignored due to the lack of non-compliance. *Id.* The plaintiff asserts that  
05 the ALJ should not have used the evidence of non-compliance to find him not credible because  
06 the plaintiff, according to Dr. Ahmed, was "significantly ignorant" of the proper diet, because  
07 it strains credulity to find that he did not suffer the limitations claimed, and because according  
08 to the post-hearing declaration filed by Dr. Ahmed, the plaintiff's non-compliance was not  
09 unusual for patients with diabetes. Dkt. No. 12 at 12.

10 The plaintiff's arguments miss the mark for several reasons. First, the ALJ's credibility  
11 determination was not based solely on the overwhelming evidence in the record of the  
12 plaintiff's failure to comply with suggested treatment, but also on the other issues set forth  
13 above. These issues are not challenged by plaintiff.

14 Second, failure to comply, as discussed above, is a legitimate basis upon which to base  
15 an adverse credibility determination. To suggest that it be ignored because the plaintiff was  
16 "significantly ignorant" of the proper diet overlooks the fact that the plaintiff was found to  
17 have no cognitive or intellectual deficiency that would affect his mental abilities to comply  
18 with treatment. AR at 25, 152.

19 Third, as to whether it strains credulity to find that plaintiff did not suffer the  
20 limitations claimed, analysis of these issues is particularly directed to the ALJ. *Andrews*, 53  
21 F.3d at 1043. The ALJ noted that the plaintiff was able to perform multiple activities of daily  
22 living regardless of his asserted functional limitations. For example, the plaintiff was active  
23 with "different jobs, kids' sports programs," he traveled, performed household chores, did  
24 grocery shopping, assisted in the care of his children, attended church and volunteered as a  
25 youth pastor. AR at 27. An ALJ is authorized to consider a claimant's daily activities when  
26 making an assessment of the claimant's credibility. *Reddick*, 157 F.3d at 772. These activities

01 are inconsistent with the plaintiff's claims that he spent most of the day sitting with his feet  
02 elevated. The ALJ did not err in this regard.

03 Fourth, the fact that many persons, according to Dr. Ahmed's declaration, find it  
04 difficult to follow instructions does not impact the credibility assessment. Indeed, if this were  
05 to be the case, an ALJ would be unable to make a credibility assessment in any case involving  
06 diabetes. Instead, the ALJ meticulously reviewed the history of non-compliance, as well as the  
07 excuses offered by the plaintiff in this regard. The plaintiff offered many different reasons for  
08 his failure to comply. For example, after discussing the impact of non-compliance with the  
09 plaintiff, Dr. Ensminger noted that the plaintiff attributed his non-compliance to different jobs,  
10 kids' sports programs, and "lots of excuses which he knows are really no excuse for him not  
11 taking care of himself." AR at 183. Between 2002 and 2004, plaintiff had no follow-up,  
12 explaining he had been busy with his "personal life and other issues and hence ha[d] not been  
13 able to make an appointment." AR at 178. Later, Dr. Ahmed noted that the plaintiff  
14 continued to be noncompliant because "he has had family issues, including traveling." AR at  
15 167.

16 The ALJ is charged with making credibility assessments. Here, the adverse credibility  
17 assessment is fully supported by the record. The ALJ did not err by considering the plaintiff's  
18 non-compliance as a factor in that adverse credibility determination.

19 D. The ALJ Did Not Err in His Evaluation of Dr. Ahmed's Opinions

20 In his final assignment of error, the plaintiff claims the ALJ did not properly evaluate  
21 the medical opinions of Dr. Ahmed. Dkt. No. 12 at 13. Dr. Ahmed was the treating physician  
22 for the plaintiff.

23 As a matter of law, more weight is given to a treating physician's opinion than to that  
24 of a nontreating physician because a treating physician "is employed to cure and has a greater  
25 opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751;  
26 *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). "Likewise, greater weight is

01 accorded to the opinion of an examining physician than a non-examining physician.” *Andrews*,  
02 53 F.3d at 1041; *see also* 20 C.F.R. § 416.927(d)(1).

03 A treating physician’s opinion, however, is not necessarily conclusive as to either a  
04 physical condition or the ultimate issue of disability, and can be rejected, whether or not that  
05 opinion is contradicted. *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a  
06 treating or examining physician, the ALJ must give clear and convincing reasons for doing so  
07 if the opinion is not contradicted by other evidence, and specific and legitimate reasons if it is.  
08 *Reddick*, 157 F.3d at 725. “This can be done by setting out a detailed and thorough summary  
09 of the facts and conflicting clinical evidence, stating his interpretation thereof, and making  
10 findings.” *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state  
11 his conclusions. “He must set forth his own interpretations and explain why they, rather than  
12 the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.  
13 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*,  
14 157 F.3d at 725.

15 In October 2004, Dr. Ahmed wrote that the plaintiff had very poorly controlled  
16 diabetes mellitus type 2, severe neuropathy with neuropathic pains in his lower extremities,  
17 depression and chronic abdominal pain secondary to pancreatitis. He asked that the plaintiff  
18 be given permission to be on short-term disability until more optimum control could be  
19 achieved. AR at 159. The ALJ gave this report little weight, finding that the report did not  
20 have any analysis of specific limitations, that plaintiff was non-compliant, that the disability  
21 was short-term in nature until the plaintiff could get his diabetes under control, and that he had  
22 been released to perform work release. AR at 29-31.

23 The ALJ determined that the plaintiff had a residual functional capacity of doing light  
24 work. AR at 34. He based this in part on the report of reviewing state agency physician,  
25 Alnoor Virji, M.D. AR at 28, 210-15. The ALJ also noted that the plaintiff encountered some  
26 unrelated legal difficulties in September 2005. He was given a sentence of work release.

01 Plaintiff sought, and obtained, a delay of his work release obligations until he recovered from  
02 an automobile accident, but in October 2005, Dr. Ahmed released the plaintiff to complete  
03 these requirements. AR at 266. The ALJ cited this as evidence that Dr. Ahmed did not  
04 believe that the plaintiff was unable to do work-related activity. AR at 31. This was not error  
05 on the part of the ALJ.

06 In addition, the ALJ cited the fact that in October 2004, Dr. Ahmed recommended that  
07 plaintiff receive “short-term disability” until he was able to gain control over his diabetic  
08 condition, which he had been ignoring previously. AR at 29. The notion of need for short-  
09 term disability does not meet the durational test for disability for purposes of Social Security,  
10 which requires that both the impairment and the inability to work last at least twelve months.  
11 *Barnhart v. Walton*, 535 U.S. 212, 217 (2002).

12 Finally, the ALJ discounted Dr. Ahmed’s October 2004 opinion, because it contained  
13 no analysis of plaintiff’s impairment-related functional limitations. AR at 29-30. An ALJ  
14 “may discredit treating physicians’ opinions that are conclusory, brief, and unsupported by the  
15 record as a whole . . . or by objective medical findings.” *Batson*, 359 F.3d at 1195.

16 It is possible to construe the medical evidence as urged by the plaintiff. However, it  
17 cannot be said that the evidence is susceptible of only the interpretation urged by the plaintiff.  
18 When the evidence is susceptible to more than one rational interpretation, it is the  
19 Commissioner’s conclusion that must be upheld. *Thomas*, 278 F.3d at 954.

20 This conclusion is not altered by the subsequent declaration of Dr. Ahmed, filed after  
21 the ALJ decision. As discussed above, in § VII. A., post-hearing submissions are less  
22 persuasive. Moreover, the declaration in question was specifically considered by the Appeals  
23 Council, which discussed the basis for why the so-called new evidence would not change its  
24 conclusions. The plaintiff has not assigned error to the Appeals Council analysis or  
25 consideration of this evidence.  
26

VIII. CONCLUSION

For the foregoing reasons, the Court recommends that this case be AFFIRMED and this matter DISMISSED with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 13th day of March, 2008.

  
JAMES P. DONOHUE  
United States Magistrate Judge